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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1201

In the Matter of the Application of

NEW YORK DOCK RAILWAY,

Appellant,

To Review the Determination of the Director of Finance of the City of New York,

Appellee.

with respect to an alleged Utility Tax Deficiency.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

W. BERNARD RICHLAND
Corporation Counsel
Counsel for Appellee
Municipal Building
New York, New York 10007
(212) 566-3327

SAMUEL J. WARMS
of Counsel.

TABLE OF CONTENTS

	Page
Motion to dismiss	
Preliminary Statement.....	1
Statute Involved.....	4
Facts.....	6
Argument	
A Tax on receipts from transportation of goods wholly within the City of New York where the transportation is a local segment of an interstate shipment, does not constitute an improper burden on interstate commerce.....	8
Text of Court of Appeals memorandum opinion.....	1a

TABLE OF CASES AND AUTHORITIES

CASES

Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).....	9
Canton R. Co. v. Rogan, 340 U.S. 511 (1951).....	3, 8, 12, 14, 15, 16

TABLE OF CASES AND AUTHORITIES

CASES

Galveston, Harrisburg &c R. Co. v. Texas, 210 U.S. 217 (1908).....	8
Gwin, etc., Inc. v. Henneford, 305 U.S. 434 (1939).....	9
Greyhound Lines v. Mealey, 334 U.S. 653 (1948).....	3, 8, 11, 12, 15, 16
Central Greyhound Lines v. Mealey, 298 N.Y. 876, 84 N.E. 2d 801 (1949).....	11, 14
Joseph v. Carter & Weekes, 330 U.S. 422 (1947).....	3, 8, 9, 10, 11, 12, 14, 15
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940).....	9
Puget Sound Co. v. Tax Commission, 302 U.S. 90 (1937).....	8, 10
Standard Steel Co. v. Washington Revenue Dept., 419 U.S. 560 (1975).....	16

TABLE OF CASES AND AUTHORITIES

CASES

Western Live Stock v. Bureau, 303 U.S. 250 (1938)..... 9

Western Maryland R. Co. v. Rogan, 340 U.S. 520 (1951)... 14

STATUTE

New York Utility Tax..... 4

OTHER AUTHORITIES

Hartman, State Taxation of Interstate Commerce, (1953) at pp. 204, 205 and 206..... 10

Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harvard Law Rev. 40 (1953).. 10

Powell, New Light on Gross Receipts Taxes, 53 Harvard Law Rev. 909 (1940)..... 10

Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev., 501 & 710, at pp. 743-746 (1947)..... 10

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I

Preliminary Statement

The Appellant has appealed from a Final Order and Judgment of the Court of Appeals

of the State of New York dated December 22, 1976, which affirmed an order of the Appellate Division of the Supreme Court of that State.

This Motion to Dismiss is made on the ground that the issue raised does not present a substantial Federal question.

The memorandum opinion of the Court of Appeals is officially reported in 40 NY 2d 1037. At the time of writing the opinion has not yet been published in the Northeastern reporter. It appears in part at page 18 of the Appellant's jurisdictional statement and more fully in a postfix to this text. The memorandum opinion of the Appellate Division is officially reported in 50 A.D. 2d 540 (1st Dept. 1975), 375 N.Y. Supp. 2d 328 (1975) and

its text is set forth at page 17 of that statement.

By this appeal Appellant challenges the constitutional validity of the New York City Utility Tax Law when applied to its receipts from its carriage of goods in interstate and foreign commerce which carriage takes place entirely within the boundaries of the City of New York. At issue is whether or not this Court's decision in Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947) was effectively overruled by this Court's later decisions in Greyhound Lines v. Mealey, 334 U.S. 653 (1948) and Canton R. Co. v. Rogan, 340 U.S. 511 (1951) and whether or not they became the controlling authorities.

II

Statute Involved

The provision of the New York City Utility Tax Law, Title QQ of Chapter 46 of the Administrative Code of the City of New York, relevant to this appeal is set forth at page 2 of appellant's Jurisdictional Statement.

III

Statement of the Case.

This proceeding was instituted under the provisions of Article 78 of the Civil Practice Law and Rules of the State of New York to review a final determination of the Appellee, which, based on certain of appellant's gross receipts, determined that there was due under the New York City Utility Tax Law the amount of $2,935.66 together with interest and/or

penalty of $1,374.11, a total of $4,309.77. The part of this tax which related to stevedoring receipts was eliminated by Appellee's consent to a reduction of the determination.

The determination under review was issued after a hearing held by Appellee, at which evidence was adduced and testimony given by Appellant and Appellee, both having appeared by counsel at that hearing.

Under New York Practice, the administrative hearing constitutes a trial of the issues in the case (Art. 78, New York Civil Practice Law and Rules). The determination issued in this case after the hearing was reviewed by the Supreme Court of the State of New York, Appellate Division, First Department, which unanimously confirmed it. Upon appeal by the Appellant to the Court of Appeals of the

State of New York, that Court unanimously affirmed the order of the Appellate Division.

VI

Facts

Appellant operates a railroad located entirely within the City of New York with ancillary car-float service. During the period January 1, 1969 to December 31, 1970 it had receipts of $64,544.50 from operations, erroneously called "lighterage operations", receipts from stevedoring operations, which were eliminated from the issues, and miscellaneous receipts from other operations which also are not in issue. The receipts denominated as "lighterage" were received for transportation wholly within the City of New York. The taxpayer's services here consisted of floating railroad cars from the terminals

of interstate railroads within the City of New York across waters wholly within the City to its rail terminals and moving those cars over its tracks wholly within the City to consignees located along those tracks.

Appellant also engaged in stevedoring operations on ships bound for and coming from foreign countries at piers in Brooklyn. Because the receipts from stevedoring activities may have raised questions under the Import-Export clause of the Constitution, the Appellee consented to an appropriate modification of his determination, with the result that these receipts are not in issue. Similarly Appellant did not contest the inclusion of other receipts in the Appellee's determination, receipts from various local activities.

V

Argument

A TAX ON RECEIPTS FROM TRANSPORTATION OF GOODS WHOLLY WITHIN THE CITY OF NEW YORK WHERE THE TRANSPORTATION IS A LOCAL SEGMENT OF AN INTERSTATE SHIPMENT, DOES NOT CONSTITUTE AN IMPROPER BURDEN ON INTERSTATE COMMERCE.

The Appellee believes that the cases of Greyhound Lines v. Mealey, 334 U.S. 653 (1948) and Canton R. Co. v. Rogan, 340 U.S. 511 (1951) resulted in the sub silentio overruling by this Court of its earlier holdings in Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947) and Puget Sound Co. v. Tax Commission, 302 U.S. 90 (1937) on which cases the Appellant relies. Also overruled by these later cases, was Galveston, Harrisburg &c Ry. Co. v. Texas, 210 U.S. 217 (1908) which, despite

its factual resemblance to the instant case, Appellant does not cite.

The City of New York brought the Carter & Weekes case to this Court on the heels of a relatively new approach to tax cases involving the commerce clause. At that time it felt that the cases of Western Live Stock v. Bureau, 303 U.S. 250 (1938), McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), Gwin, etc., Inc. v. Henneford, 305 U.S. 434 (1939) and others, cleared the way via the multiple tax burdens doctrine, for a new approach to the stevedoring cases. Chief Justice Stone throughout the development of the multiple tax burdens doctrine led the way to a more realistic approach to balancing the protection of interstate

commerce and the needs of the taxing states and jurisdiction.

However, as we know, this Court in the Carter & Weekes case adhered to the earlier Puget Sound case in a 5-4 decision. The decision was unexpected. See Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harvard Law Rev. 40 (1943) and Powell, New Light on Gross Receipts Taxes, 53 Harvard Law Rev. 909 (1940). The Carter & Weekes decision was the subject of extensive adverse criticism by authorities in the field of interstate commerce. See Hartman, State Taxation of Interstate Commerce (1953) at pp. 204, 205 and 206; Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev., 501 & 710, at pp. 743-746 (1947).

In the Carter & Weekes case Mr. Justice Douglas wrote a strong partial dissent (330 U.S. p. 434-435). In this dissent Justice Douglas reflected the arguments of the City with respect to the interstate commerce involved but felt strongly that the stevedoring of imports and exports violated Article I, §1 cl. 2 of the Constitution (id., pp. 444-445) which he felt was written "in terms which admit no exception but the single one which it contains". (id., p. 445). A little over a year later this Court decided Greyhound Lines v. Mealey, 334 U.S. 653 (1948). The Greyhound Lines case squarely supports the present tax as constitutional especially when it is read together with the decision of the New York Court of Appeals on remand. See Central Greyhound Lines v. Mealey, 298 N.Y. 876, 84 N.E. 2d 801 (1949). The Greyhound

Lines case involved a gross receipts tax apportioned on the basis of mileage within the state to the total mileage of the interstate journey.

Some four years after the decision in the Greyhound Lines case, came Canton R. Co. v. Rogan, 340 U.S. 511 (1951), a case factually indistinguishable from the case at bar. We think it significant that the opinion of the Court was written by Mr. Justice Douglas (Chief Justice Vinson did not participate in the decision; Justice Jackson and Justice Frankfurter reserved decision). When read in the light of his dissent in the Carter & Weekes case, it becomes clear that the Court in the Canton case did discard the rationale of the Carter & Weekes case. The Canton case involved both the import-export clause and

the commerce clause of the Constitution. The railroad company operated a railroad line connecting marine terminals with the lines of major trunk railroads. The railroad contested the imposition of a Maryland gross receipts tax apportioned to the mileage of its railroad lines within the State as violative of both the commerce and import-export clauses. The apportionment resulted in a tax on all its receipts since the lines of the railroad were confined to Maryland. This Court held that the railroad was not protected against the tax by the import-export clause of the constitution because importing and exporting "begin and end at water's edge" (340 U.S. at p. 515) thus distinguishing it from the protection which Justice Douglas thought was extended to the foreign commerce activities

in the Carter & Weekes Case.*

The tax at bar is imposed by a law, the structure and language of which have been construed as calling for apportionment of interstate transportation receipts by mileage. Central Greyhound Lines v. Mealey, 298 N.Y. 876; 84 N.E. 2d 801 (1949). Indeed, Mr. Justice Douglas in the Canton R. case cited this Court's decision in Central Greyhound Lines as authority for the validity of a tax on transportation apportioned by mileage. Like the Maryland tax involved in Canton R. Co. the New York City Utility Tax is apportioned precisely in the ratio that taxpayer's New York City

*The Canton Railroad case and its companion, Western Maryland R. Co. v. Rogan, 340 U.S. 520 (1951), even cast some doubt on the foreign commerce holding of Carter & Weekes (340 U.S. at pp. 515 and 522), treating that as "a question we reserve" (ibid).

mileage bears to its total milegage, i.e., 100%.

The rationale of the Carter & Weekes decision was that a state could not impose a tax directly on interstate commerce itself even though the tax posed no threat of multiple tax burdens. Both Greyhound Lines and Canton sustained taxes levied directly on just such interstate transportation, the carrying of passengers in interstate commerece and the switching of cars (from railhead to railhead, Canton, Applt's br. pp 6 & 7) which switching yielded approximately $500,000 in receipts out of total receipts of about $700,000 [Canton Rec. p. 1(a)]. Appellant would believe that Canton involved only the import-export clause and secondarily the commerce clause, but a quotation from the

opinion reveals that (340 U.S. at p. 515):

> "[t]he objection to Maryland's tax on the ground that interstate commerce is involved is not well taken."

Although Appellant in its Jurisdictional Statement indicates that the citation by the Appellate Division, on whose memorandum the Court of Appeals affirmed (Applts. Juris. Statement pp. 8, 17 & 18), of Standard Steel Co. v. Washington Revenue Dept., 419 U.S. 560 (1975) was not appropriate, we believe the New York Court cited it for the same reason for which we cite it, namely as a recent example of the application of the multiple tax burdens doctrine which was the basis for Greyhound Lines and Canton R. Co.

Conclusion

The appeal from the Order and Judgment of the Court of Appeals of the State of New York should be dismissed.

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Counsel for Appellee
Municipal Building
New York, N.Y. 10007

SAMUEL J. WARMS,

of Counsel.

MEMORANDUM OPINION OF N.Y. COURT OF APPEALS

In the Matter of NEW YORK DOCK RAILWAY, Appellant, v. DIRECTOR OF FINANCE OF THE CITY OF NEW YORK, Respondent.

APPEAL, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 18, 1975, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court at Special Term, entered in New York County), unanimoulsy modified, on the law, and, as modified, confirmed a determination of respondent taxing petitioner's receipts for transportation services ("lighterage") and for loading and unloading ships ("stevedoring"). The modification consisted of annulling the tax imposed on the stevedoring operations. Petitioner operated a railroad located entirely within the

City of New York. The Appellate Division stated that petitioner's stevedoring activities involved exports and imports and that taxation of those operations was beyond the power of the city; but that there was no such immunity from the city's utility tax for petitioner's receipts from rail and water transportation services rendered entirely within the city. In the Court of Appeals petitioner argued that the Utility Tax Law of the City of New York (Administrative Code of the City of New York, § QQ46-2.0) was unconstitutional as applied to gross receipts from interstate and foreign commerce.

Osmond K. Fraenkel and Elias Messing for appellant.

W. Bernard Richland, Corporation Counsel (Samuel J. Warms of counsel), for respondent.

Judgment affirmed, with costs, on the memorandum at the Appellate Division (50 AD2d 540).

Concur: Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE.